MICHIGAN SUPREME COURT

PUBLIC HEARING
JANUARY 26, 2011

CHIEF JUSTICE YOUNG: Good morning. It's still appropriate to say Happy New Year. We welcome you all to the first public hearing of 2011. The first matter on the administrative agenda is Item 1 - 2002-24 - proposed amendment of Rule 7.3 of the Michigan Rules of Professional Conduct. We have speakers who wish to speak to this proposal, and, generally, it's - it would require a lawyer seeking employment from a perspective client to designate in writing as an advertisement and display advertising material on it.

ITEM 1: 2002-24 - MRPC 7.3

MR. EDICK: Good morning. May it please the Court. My name is Robert Edick with the Attorney Grievance Commission. I'm here today on behalf of the Grievance Administrator and the Commission to express support for the proposed amendment to Rule 7.3.

If I get a letter from a lawyer or law firm and its marked advertising material, then it becomes my choice whether to open that, read it, or whether I throw it in the trash. If I get a letter from a lawyer or a law firm and there's no warning on there as to whether it contains advertising material or not, then I'm forced to open it because no prudent person would ignore that. It might contain a subpoena, demand for retraction, a complaint that's being served by mail. You wouldn't have any idea what was in there, and I think that the choice should be with the recipient of the mail. Lawyers and law firms shouldn't be allowed to exploit that ambiguity to arrest the attention of the recipient. It's really not a First Amendment issue as some of the people commenting on this have said, it's a privacy issue - the right to be left alone that's - that's at work here.

The proposed amendment tracks essentially to the model rules, and I think that it's a - I'm not here to suggest this is a major problem in this state. I think, however, during the fifteen years I've been with the Commission some

of the most emotional and vociferous complaints that we've had that have come in have been people that have received letters like that hard on the heel of an accident that may have taken the life of a relative, people who have had spouses that have filed for divorces, etc., and so it - in their mind I think reinforces the kind of most cynical views of the profession that lawyers essentially are capitalizing on the woes of - of other people. So I think the amendment as it's proposed here would, again - would put the control into the recipient's hand to decide whether to review the material or not. So we would encourage the Court to adopt the amendment as it's proposed.

JUSTICE MARKMAN: Mr. Edict?

MR. EDICK: Yes.

JUSTICE MARKMAN: If that's the problem, why wouldn't the better approach to be the adoption of a rule along the lines of that existing in many states which provides a cooling-off period between the time of a divorce or some kind of tragedy along the lines that you described before an attorney can engage in such a communication. I think there are nineteen or twenty states that have that kind of rule. Why wouldn't that be a more properly focused rule rather than a very broad rule that we have here that concerns all communications - even if they have no direction - connection with any kind of tragic episode that may have occurred to the recipient?

MR. EDICK: Well, I think that approach is something that I would also support as well. I think that the - I notice that some of the comments indicated that - that they felt the rule was so broad that it could include a lawyer seeking employment as in-house counsel and that they would have to attach the word advertisement to their correspondence.

CHIEF JUSTICE YOUNG: It wouldn't be a solicitation of a client in such a case, would it?

MR. EDICK: It would depend, I guess, if the client - if the client's the corporation. I'm not sure if communicating with general counsel -

CHIEF JUSTICE YOUNG: The client's a potential employer.

MR. EDICK: Right. I think that - if the Court felt that was a problem, the - the model rule does include the language that's not in the proposed amendment about known to be in need of legal services - a prospective client known to be in need of legal services in a particular matter. And so that I think if the Court was - felt that that was an issue by adding that phrase might take that away because someone just generally seeking employment with a corporation would not I think be soliciting a perspective client known to be in need of legal services in a particular matter.

CHIEF JUSTICE YOUNG: It wouldn't be a solicitation of a client, it would be a solicitation of employment, wouldn't it?

MR. EDICK: Well, and that's how I would interpret this. The - I think it's a rather fanciful objection, but if the Court felt that - that there was any merit to that at all that perhaps that phrase could be added. I don't think there's a problem with the rule as proposed. The - When I was reviewing the letters that were on file with the Court and commenting on this, I noticed that one or two people have raised that issued.

JUSTICE MARILYN KELLY: Yeah, you noticed that more than one or two raised it, and, in fact, you're the only one who's taken this position on this Mr. Edick. As much as I respect your work you do for the AGC, I've got to say that you're pressing on us something which is thought by many to be overbroad, ambiguous, and likely to cause confusion. Do I understand you to say that you would accept Rule 7.3 if we - if we were to adopt that?

MR. EDICK: The one that's proposed, Justice Kelly, or -

JUSTICE MARILYN KELLY: 7.3 which is the ABA Model Rule of Professional Conduct.

MR. EDICK: Yes. I think - I think that the proposed rule essentially tracks that with the exception of that phrase that I mentioned about - that modifies the words perspective client. The model rule goes on to say known to be in need of legal services in a particular matter. And so I think that that would clarify further this issue of

someone communicating with regard to an in-house position with a corporation for example.

JUSTICE MARKMAN: What is a solicitation, Mr. Edick? There are many ask the lawyer-type shows on radio, are those solicitations? There's usually a -

MR. EDICK: The show itself I don't think. You mean if the - you mean when a lawyer appears on cable TV and takes - fields call-in questions from callers.

JUSTICE MARKMAN: Yes, our host today is John Jones of the law firm Blank, Blank, and Blank in Detroit, Michigan, and he's here to answer your questions for the next half hour.

MR. EDICK: Right. He's responding to someone that's - that's taken the time to call into the show which I think is different than a lawyer issuing letters, for example, into someone's household with no indication that they're interested in hearing from the lawyer.

JUSTICE MARKMAN: What if he pays for the show as I think is the case on some radio stations?

MR. EDICK: Well, it still - I think the dynamic there is you have the possible perspective client initiating the contact with the lawyer.

CHIEF JUSTICE YOUNG: So if even - so even if such a show were sponsored by 1-800-Call-Bob, and Bob Young appears on the show, you don't see that as a solicitation.

MR. EDICK: No, I don't because I think - I think the difference there is that - I see that more as advertising than I do a solicitation because the - the call itself is an initiated by the person watching the show - decides that they want to call and ask that lawyer questions.

JUSTICE MARKMAN: But I don't understand the distinction between advertising and solicitation. Isn't advertising essentially a mass solicitation?

MR. EDICK: Right, and it usually occurs - it occurs in the context where people can either pay attention to it or not. I mean if I see Mr. Fieger -

JUSTICE MARKMAN: So why do we even cover electronic communications, you could always turn off electronic communications. They're never imposed upon a person. Why doesn't the rule even cover electronic communications, if the distinction is that you can't turn off mail?

MR. EDICK: Well, I - I've taken that to be a reference to email.

JUSTICE HATHAWAY: What about if a lawyer writes an article in the community paper like once a week or once a month?

MR. EDICK: I would think that would be the same as a - the cable TV show, and if - and if somebody contacts him or her because of that article, I don't have a - that's - I don't consider that to be a solicitation.

CHIEF JUSTICE YOUNG: Let me just clarify your position. You don't believe that advertising on TV or radio should be subject to the requirement of being labeled as an advertisement - or advertising material.

MR. EDICK: Well, I think - I think the fact that it's on TV or the radio is the - is itself alerting people that this is an advertisement. I don't think anyone could mistake it.

CHIEF JUSTICE YOUNG: So you think the rule should not include media advertising.

MR. EDICK: I don't think it should, no, I don't. I think radio or television is not - I think people are free to pay attention or not to that, so it's -

CHIEF JUSTICE YOUNG: That would - that would be included like media - like newspaper - a full-page ad, 1-800-Call-Bob if you've got a problem.

MR. EDICK: Absolutely.

CHIEF JUSTICE YOUNG: Okay.

JUSTICE ZAHRA: Same for billboards.

MR. EDICK: Yes. Now they have to - they can't be false or misleading, but I don't -

CHIEF JUSTICE YOUNG: No, but a - we're talking about a naked solicitation the form of which is television, radio, or papers, or billboards.

MR. EDICK: Yes.

CHIEF JUSTICE YOUNG: Those are - you think are inherently advertising and the public understands that.

MR. EDICK: That's my understanding, yes. I think those are off-bounds so long as they're not false or misleading.

JUSTICE ZAHRA: So you're really saying it only applies to mail - snail mail and email.

MR. EDICK: Yes.

JUSTICE MARKMAN: What if a mail message says the United States Supreme Court has recently decided a case that allows corporations to dominate the political process. Call attorney Joe if you want more information about this. Call attorney Joe if you want to know what can be done about this. The Michigan Supreme Court has recently undermined the rights of injured persons. Call attorney Joe if you want to know what we can do to respond to that.

MR. EDICK: Well, I think that would be protected not only because it's obviously political commentary, and I think, again, that it - it is leaving the choice with the perspective client as to whether to contact that lawyer or not.

JUSTICE HATHAWAY: So it sounds like if it's obvious you don't have to say that this is an advertisement if it's obvious that it is. But if it's not obvious that it is, you have to have it. Wouldn't - isn't that - wouldn't that cause a lot of confusion?

MR. EDICK: No, I think - I think the - Justice Zahra had mentioned - we're talking about mail or email - we're talking about where the attorney is initiating the contact with the perspective client that that should be labeled in some fashion to put that person on notice that this is a solicitation or in affect an ad. If it's billboards, newspapers, radio, TV, cable shows, whatever, that the

context inherently lets people know that they can either pay attention or not, they're not required if they don't want to - to invest anytime in that as opposed to receiving a letter that just is from a lawyer and might contain anything.

JUSTICE HATHAWAY: And you're okay with the ABA version where they - the designation is necessary only if the communication is directed at a person known to be in need of legal services in a particular matter.

MR. EDICK: I - I think that tightens the - the rule up.

JUSTICE HATHAWAY: Well, how are you gonna prove that - that this person was known to be in need of legal services in a particular matter?

MR. EDICK: Generally, the letters here are triggered by lawyers who are trolling court dockets or accident reports or arrest records, and there's a reason why they've targeted a particular person. It started some years ago -

JUSTICE HATHAWAY: Is that gonna be an objective view or a subjective view?

MR. EDICK: With respect to known to be in need of -

JUSTICE HATHAWAY: Right.

MR. EDICK: Well, I think they've always be able - I think they only invest their time in these letters if there's some objective evidence in the form of an accident report, a divorce filing, a -

JUSTICE HATHAWAY: Well, what if - say you've got a law firm that sends out these communications monthly - it's like a newsletter, and some of the people that are receiving these are maybe old clients, they're trying to update them on the law or whatever, but some of them are actually people who might be on that list who objectively you could say this person is known to be in need of legal services in a particular matter, but the law firm may not really know that that person is.

MR. EDICK: Well, I don't see -

JUSTICE HATHAWAY: I mean I - I see there could be a big problem with enforcing this and trying to figure out if, in fact, somebody really did violate this.

MR. EDICK: The newsletter I don't see as being covered by this. I don't see a newsletter as being soliciting someone who's known to possibly need legal advice in a particular matter. So I don't -

JUSTICE HATHAWAY: Well, what if there - there's like some major car accident and there's twenty people involved in that and they die, and then this newsletter happens to go out to some of these people as well as thousands of other people. I mean -

MR. EDICK: Well, then I think the fact that it's a newsletter that was disseminated in this mass fashion you don't ever reach this issue about did it hit - reach some people that might have fallen within this category. I mean at that - you never reach that second issue. The first issue is a newsletter widely disseminated is not this kind of targeted solicitation that the rule goes after.

JUSTICE MARY BETH KELLY: You said at the out-set that your primary concern with this rule was to alleviate those persons who were targeted with what you called advertising that came at inopportune times - they were subject to a tragedy in their lives or some emotional distressing legal issue such as a divorce. And, if that's the case, why wouldn't the prohibition against solicitation cover those instances?

MR. EDICK: Well, the - we have to work with the *Shapiro* case which permits - you know it opens the door to what was traditionally you know banned as solicitation. And it's not so - our support for the rule is not so much to protect the wounded sensibilities of you know people that might be receiving these, it's just intended to keep the choices to whether they should read this material or not. The - this ambiguity of a law firm sending you a letter - I know I would never not open a letter that came from a law firm, so why should lawyers and law firms be able to leverage that sort of uncertainty and to capture the attention of a recipient. Why shouldn't it simply say advertising material, if I want to open it I will, and if not I'll throw it away. And - and that's really what - what we're looking at here to address, and I think both the

model rule and the proposed rule are at there. We're not after newsletters, billboards, or things that –

JUSTICE MARY BETH KELLY: So you're not suggesting that these – that lawyers are targeting persons with this advertising – or you're not suggesting that they're using advertising as a form of solicitation.

MR. EDICK: Well, I think it is – I think advertising when it's targeted becomes solicitation, so I'm not sure there's a – a real fine line there. But – and, again, it's a – we're – we're forced to grapple with the *Shapiro* case and what the U.S. Supreme Court has – has done here. But I think that – and, again, the reason this has come up over the years and started to see these ten or twelve years ago at the Commission with lawyers that would go and review accident reports from police departments and then lawyers hit on the idea of reviewing circuit court filings in terms of –

JUSTICE MARY BETH KELLY: But wouldn't that be solicitation that's already prohibited by the rule?

MR. EDICK: Not as long as it's within the meaning of the *Shapiro* case. They can't call the person, but they can – they can under *Shapiro* address letters to those people and in a very sort of generic way say I noticed your spouse has filed for divorce, you have certain rights, you may want to etc., etc., call me. And as long – and so – see those letters are permitted, so we can't stop lawyers from continuing to troll the records to identify the *Shapiro*-type potential clients. What we can do though is require that if they do target them with these letters or emails, that at least these potential clients are – are aware or put on notice that oh, by the way, this is an attempt to solicit business – its advertising – whatever you want to call it.

CHIEF JUSTICE YOUNG: Thank you, very much.

MR. EDICK: Thank you.

ITEM 2: 2008-12 – MCR 2.002

CHIEF JUSTICE YOUNG: Item 2 – 2008-12 involves the proposed amendment of Rule 2.002 of the Michigan Court Rules, and generally concerns whether to adopt an amendment

to that rule that would clarify the court may deny a party's indigency status if the action is found to be frivolous. There are two speakers - Elan Nichols. You have three minutes.

MS. EDWARDS: Good morning. May it please the Court. My name is Courtney Edwards and I'm a second year law student -

CHIEF JUSTICE YOUNG: Oh, I'm sorry. I misidentified you.

MS. EDWARDS: that's okay - and housing law clinician at Michigan State University College of Law. I come before you this morning in opposition to the proposed amendment to Michigan Court Rule 2.002 that would allow the Court to deny a party's indigent status if the action is found to be frivolous or malicious. As a low-income, nonprofit clinic, the MSU Housing Law Clinic primarily serves those individuals that would be potentially affected by the proposed amendment to MCR 2.002.

JUSTICE MARKMAN: Well, do you file a lot of frivolous briefs on their behalf?

MS. EDWARDS: No, sir, we do not, that is not our intention.

JUSTICE MARKMAN: So what's the concern?

MS. EDWARDS: Well, the concern is that these - these potential - this potential amendment would potentially provide possible chances of abuse in the system as far as a lack of judicially recognized standards as to how judges would determine these frivolous or malicious claims.

CHIEF JUSTICE YOUNG: Well, you think there is no jurisprudential standard of - existing for determining what is frivolous or vexatious or otherwise inappropriate?

MS. EDWARDS: No, your honor, that is not my contention here.

CHIEF JUSTICE YOUNG: Well, you said there were no standards by which frivolousness would be determined. I believe there are fairly substantial bodies of law on that very question.

MS. EDWARDS: Yes, your honor. However, the proposed amendment as it is stated does not necessarily clarify as to whether this will apply to repetitious filings or whether it would indicate failure to comply with court standards. And, furthermore, your honor, there are also several other rules that speak to this point such as MCR 2.114, 2.401, and MCR 2.625 that also address the point. So the rule as it's proposed also presents a sense of redundancy as well being as though there are already rules that specifically address this point.

JUSTICE MARKMAN: So you think this is actually a pretty good idea, but this would just be repetitive.

MS. EDWARDS: Yes, your honor, that is - that is my point exactly. And also the amendment is, in fact, vague as to whether this would particularly apply to an indigent status in this particular case or future cases, it just indicates that "if the action is deemed frivolous or malicious the court may deny leave to proceed." However, it does not specifically indicate if it's for this particular action or another. So it's vague in a sense that it doesn't mention that point as well. But as - as far as the judicial standards, your honor, it was not my intention to say that there are a lack of standards; however, if the - if the amendment was more clear perhaps so that the indigent filer would know that you know this - this is what is going to be determined frivolous or malicious - if it's a repetitious filing or, in fact, explicit bad faith - more on the part of the indigent party more so than geared toward -

CHIEF JUSTICE YOUNG: So we have - do you think we have an obligation in this rule to explain what the case law means when it says frivolous?

MS. EDWARDS: No, your honor. I do not believe it's an obligation; however, I think for clarity in the proposed amendment especially being as though, as I already mentioned, we already have rules that address this point. If this amendment were to be proposed, it would - it would add some more clarity in the proposed amendment.

CHIEF JUSTICE YOUNG: Would you - I agree, that there is ample authority in the rules to dismiss a frivolous

suit, what - what do you think - the problem is the serial filer -

MS. EDWARDS: Correct.

CHIEF JUSTICE YOUNG: Who files suit, after suit, after suit, utilizing the resources of the court and whoever they're suing. Do you have any suggestion about how we might want to deal with such a person if indigent, because there is no consequence - you lose your suit, but you just file it again?

MS. EDWARDS: Yes, your honor, that - you make an excellent point. However -

CHIEF JUSTICE YOUNG: It's not really - if you're indigent you can't really impose sanctions realistically, right?

MS. EDWARDS: Yes, your honor. If I may - may you clarify your position a bit more for me?

CHIEF JUSTICE YOUNG: Sure. I'm talking about a person who is genuinely indigent, but who is a serial filer of frivolous lawsuits.

MS. EDWARDS: Yes, your honor.

CHIEF JUSTICE YOUNG: Do you have a - do you have a - an idea other than serially dismissing the suits as filed, is there any thought that you - you have about how courts can deal with that situation?

MS. EDWARDS: Yes, your honor. I believe that the courts could deal with that situation by maybe imposing a minimum amount of filings like if your file - if you have filed perhaps if this is your second action or your second deemed repetitious filing of a frivolous suit then it would be denied. However, in this situation -

CHIEF JUSTICE YOUNG: Then you would be denied access to the courts.

MS. EDWARDS: To the indigent status, your honor, to the indigent status. However, this - this proposal -

CHIEF JUSTICE YOUNG: So you want to impose a number of prior bad filings as a precondition for denying indigency status.

MS. EDWARDS: Yes, your honor. That - if I understood your question correctly, you were saying how would you deal with the repetitious filing. So it is my position that there could possibly be a number if the Court would so do that as far as determining that.

JUSTICE MARKMAN: I mean, Ms. Edwards, understand that the impetus for this is not to be harsh or difficult with anybody, but it's the fact that there are only so many hours in the day, and the more time that we spend on frivolous filings, the less time we have to spend on the kinds of filings that I'm sure the MSU Clinic files which are compelling filings. So this is really an effort to try to see if we can't focus the system on what the most significant and substantial grievances are.

MS. EDWARDS: Yes, your honor. I believe that the main - the main issue here is to prevent possible potential abuse in this situation being as though there are a greater number of - a large number of filings - indigent cases, but the point is to make sure there are protections against the indigent parties that this is not going to be a potential system to just dispose of cases and then possibly deny indigent parties that - that right.

CHIEF JUSTICE YOUNG: Thank you.

MS. EDWARDS: Thank you, your honor.

CHIEF JUSTICE YOUNG: Is Ms. Nichols present?

(off mike)

CHIEF JUSTICE YOUNG: Thank you.

ITEM 4 - 2010-16 - MCR 6.302, 6.610

CHIEF JUSTICE YOUNG: Then we'll move to Item 4 - MCR 6.302 and 6.610, which generally concern whether to adopt two alternative proposals that were published to address the United States Supreme Court decision in *Padilla v Kentucky* concerning the impact of deportation as a consequence of a guilty plea. Care to speak?

MS. FERGUSON: Yes, your honor. Good morning and may it please the Court. Desiree Ferguson appearing on behalf of the State Appellate Defender Office this morning. And I would begin my commending the Court for extending itself really without prompting into this arena, and undertaking a measure which we believe will help to alleviate some of the pressure on the system to which Justice Markman was just speaking by alleviating the necessity of addressing plea withdrawal motions that would be coming into the courts because of the errors that - that the *Padilla* case talks about. We are - urge the Court to adopt - of the two proposals that - that you have offered, we urge the Court to adopt proposal B - alternative B rather than alternative A. And we have indicated in our written commentaries the specific reasons. Most particularly, alternative A, we believe, inappropriately intrudes upon the attorney-client privilege because it would require some colloquy between the court and defense counsel with respect to what, if any, advice has been rendered to a non - what inquiry may have been made as to the defendant's immigration status and provided that the defendant is a noncitizen then whether there has been advice concerning the immigration consequences. And all of that we believe is - is clearly within the purview of -

CHIEF JUSTICE YOUNG: Here - here's my concern with - with both alternatives. *Padilla* is addressed to convince counsel's obligation.

MS. FERGUSON: That's correct.

CHIEF JUSTICE YOUNG: And I'm concerned that both proposals, although B, I agree with you, is less intrusive - a less intrusive judicial involvement than A, I'm concerned about having in every case for the court to make a - a statement that actually is only relevant in a fraction of the cases before it. And so I'm - I'm concerned that the remedy is very broad and - and pulling the court into a constitutional obligation that is actually not in the first instance the courts. I understand why we want to make sure we don't have ineffective assistance claims that undo the claim, so I understand we - we need to have some prophylaxis here. I'm just wondering if there is a more restrictive way of ensuring that the defense counsel has executed professionally his or her *Padilla* obligations

than having the court make this catechismic statement in every case.

MS. FERGUSON: Well, your honor, I don't know that it differs very much from say, for example, the inquiry regarding whether the defendant is on probation or parole, that is something that doesn't - certainly doesn't apply to all defendants. I don't know what percentage of them to which it applies. But it's a minor - I think - I agree with you that it's - it's not going to be relevant in every case and perhaps is only relevant in a small percentage of cases, but on - on balance, it's a very minor exercise or expenditure of the court's resources to simply say if you happen to be a noncitizen you need to know that there are these potential consequences for - for your plea. So I don't know that there's a - I'm not - I'm not directly answering your question, Justice Young, because I don't have an idea -

CHIEF JUSTICE YOUNG: Well, that's - I thought I would ask if you could - if you were aware of a less intrusive prophylaxis that accomplished what we are obviously attempting to accomplish to ensure that the defense counsel has performed his or her professional obligation to give counsel on the immigration impacts of a - a guilty plea.

MS. FERGUSON: Yeah. So my response is then, no, I'm not. I don't think that there is a way to do it without intruding upon the attorney-client relationship. And, Justice Markman, were you about to -

JUSTICE MARKMAN: I was going to ask you when you were done to explain the nature of the intrusion that you've identified here. I'm not - it's absolutely clear to me what the intrusion is given that the whole premise of *Padilla* is that we are talking about people whose deportation status may be affected by a guilty plea.

MS. FERGUSON: Well, under alternative A it says if the defendant is not a citizen - well there's no way to know that the defendant is not a citizen unless you ask somebody. You've either got to ask the defendant in which case he's in great peril to answer such a question, or you gotta ask the defense attorney who - again, if he - if he divulges his client's immigration status to the court, then he's violating his confidential conversations.

JUSTICE MARKMAN: I guess I just don't understand the concept that somebody may have available to him an ineffective assistance of counsel argument premised entirely upon the fact that he's not a citizen and has not been appraised of deportation consequences, yet a threshold inquiry as to whether or not he is or is not a citizen is somehow intrusion of some relationship. It's just hard for me to reconcile those ideas.

JUSTICE HATHAWAY: Isn't the intrusiveness the fact that the judge would ask - did you discuss this issue with your client?

MS. FERGUSON: Yes, because that's the only way the attorney can answer the question is to - is to -

JUSTICE HATHAWAY: Not whether or not he's a citizen or not, but did you talk about this.

MS. FERGUSON: Have you discussed with him his immigration status, and have you rendered advice to him concerning his immigration status. So those are the inquiries -

CHIEF JUSTICE YOUNG: Why would that be intrusive? I mean that - you'd be asking that of everybody. You're not asking for the result of the consultation, you're just asking have you discussed - In fact, I don't understand why that isn't the least intrusive question to be asked to the appropriate person - the defense counsel - maybe - if appropriate, have you discussed the implications of this plea on the immigrant status - or the citizenship status of your client. If the answer is no, I mean, then arguably there's a problem. I agree with that.

MS. FERGUSON: Yeah, what does no mean? Does no mean there is no such concern?

CHIEF JUSTICE YOUNG: Maybe - how about just asking the defense counsel have you complied with the *Padilla* obligations to your client?

JUSTICE MARILYN KELLY: So the client would sit there and have no idea what this was all about. Whereas, if the judge said to them - to the client - said to the defendant, do you realize that you could be deported as a result of a

conviction on this matter you're charged with, it would be a good bit clearer, wouldn't it?

MS. FERGUSON: It would be much more clear. If you're a noncitizen there are consequences to your taking this plea.

JUSTICE MARY BETH KELLY: But doesn't that - doesn't that make the judge - doesn't that assume that the judge has to have a level of expertise in immigration law. The question subject to deportation assumes a level of expertise in immigration law that I think you are assuming here - whether - whether a lawyer has discussed the consequences of citizenship status is one thing. Whether one is subject to deportation is an issue that - that has many, many legal layers if you will. So I think that the question whether - whether a lawyer has complied with is *Padilla* obligation is a very different question than whether a defendant is subject to deportation. A defendant could be at a different - a different procedural posture with respect to - to deportation, and - so I think it's a very different - it's a very different question to have a judge start asking the questions and getting involved in this than to simply ask the lawyer have you - have you dispensed with your *Padilla* obligations.

JUSTICE HATHAWAY: But - but alternative B would require the trial judge to advise all defendants -

MS. FERGUSON: That's correct. That's what -

JUSTICE HATHAWAY: first of all - being sentenced - that a guilty plea made by a noncitizen may carry immigration consequences -

MS. FERGUSON: That's correct.

JUSTICE HATHAWAY: and that's the extent of it.

MS. FERGUSON: That was going to be my response. That - that that's one of the - one of the excellent things about proposal - alternative B is that it speaks not only to deportation - Well, first of all, it uses the term may which you know is a qualifier, and it speaks not only to deportation but exclusion from admission and denial of naturalization. Those would be the other types of

consequences that could be involved - that could emanate from the guilty plea.

JUSTICE MARKMAN: But *Padilla* didn't - *Padilla* didn't speak about those though did it?

MS. FERGUSON: No, that's correct. *Padilla* did not speak about those. That's - that's an admirable expansion -

JUSTICE MARKMAN: An admirable expansion of -

MS. FERGUSON: from my point of view. Finally, I - I would like to - We - in our written comments, we asked the Court to consider - although we favor alternative B, we ask the Court to consider moving this change to a different place in the rule so that it - so that this colloquy happens before the defendant actually provides a factual basis for the guilty plea because it happens that once the defendant has provided the factual basis for the plea, he's already in trouble. And so - and I think that some of the other commentators - some of the immigration experts that commented spoke to that as well. And I wanted to indicated that I thought it was very interesting that the Department of Immigration and Customs Enforcement commented on this rule as well, and - and found it interesting and favorable that they also support alternative B over alternative A for the same reasons that we've indicated.

CHIEF JUSTICE YOUNG: They've also suggested that we talk - that we not use a technical term like deportation and instead use removal - something like that.

MS. FERGUSON: Yeah, because they actually don't - the statute no longer uses that term - they call it removal.

CHIEF JUSTICE YOUNG: Which is all the more reason for us to be very careful because we don't know what - as to immigration law I mean where its trends is going.

MS. FERGUSON: That's true, your honor. It is a very nuanced and dynamic area of the law. Perhaps a more generic term like immigration consequences might - might be more appropriate.

CHIEF JUSTICE YOUNG: You think it's absolutely critical as Justice Kelly's - to my left -

MS. FERGUSON: Right.

CHIEF JUSTICE YOUNG: has suggested that the defendant be advised of these *Padilla* rights as opposed to having the lawyer attest that - that those rights if relevant are given.

MS. FERGUSON: I think that it's more appropriate - if the court is interested in protecting itself from unnecessary litigation, it's more - it's more important that the inquiry be made - that the advice be rendered to the defendant rather than an inquiry be made of counsel.

CHIEF JUSTICE YOUNG: Well, the - as I understand it, isn't there a - when you do the plea you've got all the warnings and then there's a paper you have to sign, isn't it.

MS. FERGUSON: Yes.

CHIEF JUSTICE YOUNG: Why isn't - why isn't this dealt with in the paper rather than the Court giving this disquisition?

MS. FERGUSON: It would actually - should actually be addressed in both places. Most of the advice that's provided in the colloquy is repeated in the document.

CHIEF JUSTICE YOUNG: Is the lawyer - defense counsel obligated to sign it as well - at the current, if you know?

MS. FERGUSON: I do not know that, your honor.

CHIEF JUSTICE YOUNG: Because it seems to me one of the problems we have is if the lawyer is asked and lies that - that's something of consequence to the lawyer as well.

MS. FERGUSON: That's true.

CHIEF JUSTICE YOUNG: Because then you're lying to the tribunal.

MS. FERGUSON: That's true. I did want to mention though that in the context of the district court, which is also addressed in your rule, that - I don't deal as you

know with district court proceedings, but it is my understanding that the written form can in some instances substitute for an actually on the record colloquy. And so it would - so the advice, whatever decision you make, needs - would need to be incorporated into that document.

CHIEF JUSTICE YOUNG: Thank you.

MS. FERGUSON: Thank you.

ITEM 5 - 2010-18 - MRPC 6.1

CHIEF JUSTICE YOUNG: The next matter for which there are - is a discussion is Item 5. Witnesses to speak are - and that's Item 2010-18, an amendment to Michigan Rules of Professional Conduct 6.1. Are there any speakers here to address that item? Seeing none, it appears that - Oh, I'm sorry. I saw, but I didn't see anybody moving in response to the announcement. Gotta move sprightly here or you lose your opportunity. Why don't you just - all of the speakers if you could just come up and sit at counsel table. Item 5 is a proposal concerning whether to adopt one or two alternative proposals concerning the pro bono obligations of lawyers as professionals. Would you care to address it?

MR. LINN: I would. If it please the Court, my name is Thomas Linn. I'm an attorney at the firm of Miller Canfield and was a long-time commercial lawyer and then CEO of the firm, recently have stepped from - down from that position and now I'm the Chairman Emeritus of the firm and one of my duties in my post-CEO life is to superintend our pro bono program. I'm really here today to really speak in favor of alternative B that has been advanced by the State Bar. And I really do that for three reasons which I'll try to briefly describe. First of all, I believe, and our firm believes, and we've adopted a pro bono policy that suggests that pro bono activity of our attorneys in our firm should be concentrated not exclusively, but to a large extent, for low-income people and organizations that serve low income people, and alternative B makes that clearer. And for our firms perspective, we've adopted that rule, but - but having the Bar rule also support that helps us in our encouragement of people doing pro bono. In my current role, I administer attorneys doing pro bono activity not only in Michigan but in a number of other states and in Canada, and, in fact, even overseas. And the second reason I would advance approval of the alternative B is that it

would help us in our administration of pro bono activities. First of all, alternative B is more consistent with the rules that apply in other states and, in fact, in Canada and even other countries as opposed to the current rule which is not as specific. And actually the specific aspect of proposal B is also helpful to us because in our attorneys identifying potential pro bono opportunities I think specific is better - examples are better and the general leads to less performance in pro bono activity.

CHIEF JUSTICE YOUNG: And that (inaudible) you can -

MR. LINN: Pardon?

CHIEF JUSTICE YOUNG: direct your attorneys to appropriate places. You need the external -

MR. LINN: I think the external helps us.

CHIEF JUSTICE YOUNG: supervision as opposed to your internal guide.

MR. LINN: Our internal is good, but external's better. The State Bar rules have a - have a majesty of their own, and I think our - our lawyers respond to that. Finally, I would speak to the financial alternative that's suggested in alternative B. Quite frankly, when originally adopted in '90 - 1990, I thought it was quite modest compared to the income of many of our attorneys billing rates and so forth. Over time, the $300 has become more modest. I checked the Consumer Price Index and $300 in 1990 it turns out is more than $500 now. And a time when the average billing rate of all attorneys is in excess of $200, the average billing rate of lawyers in my firms and firms like mine is probably in excess of $300. Asking attorneys to donate $300 in lieu of 30 hours of pro bono puts a low price on your pro bono service. So I - the fact that alternative B at least suggests $500, which is a greater amount, I think favors its adoption. And I thank you very much for your time, and I appreciate the opportunity. Thank you, very much.

CHIEF JUSTICE YOUNG: Thank you.

MR. NUSSBAUMER: Good morning, your honors. May it please the Court. John S. Nussbaumer, Dean of Thomas M. Cooley Law School's Auburn Hills Campus, appearing here

this morning in support of MRPC 6.1, alternative B. Thanks for the opportunity to speak with you this morning. Time permitting, I hope to make three succinct points about alternative B. My remarks are based on my personal experiences over the last eight years starting two law school clinical programs and seven pro bono programs in the Metropolitan Detroit area. Those programs were mainly in response to pleas from trial judges who are seeing an ever increasing number of unrepresented litigants appearing in their courtrooms. And Judge Kelly I see you nodding your head; you know of what I speak. Among the clients served by the programs that I've been involved with - it's a broad range. It's domestic violence victims, it's senior citizens, enlisted military personnel, bankruptcy debtors, consumer fraud victims, homeowners facing foreclosure, and folks needing help with landlord tenant and criminal expungement matters. And my first point is that while any member of the pubic can engage in general charitable or community service activities, only lawyers have the unique ability to provide direct representation to persons of limited means through the provision of pro bono legal services. And the main reason why I think alternative -

CHIEF JUSTICE YOUNG: Are all lawyers competent to do so?

MR. NUSSBAUMER: I'm sorry?

CHIEF JUSTICE YOUNG: Are you suggesting that all lawyers are equally competent to do so?

MR. NUSSBAUMER: I actually believe, judge, that all lawyers with the proper training from the legal services folks who will speak to you in a few minutes can do many of the basic legal services that are necessary.

CHIEF JUSTICE YOUNG: To make - to represent people in trial courts.

MR. NUSSBAUMER: In various different capacities. Not everybody is - is good at trial court litigation -

CHIEF JUSTICE YOUNG: Right.

MR. NUSSBAUMER: so - but transactional lawyers, for example, could do what I did in July and go to Camp Grayling and write wills and powers of attorney for troops

deploying overseas. So we're not asking for one size - or mandating any kind of a particular requirement for individual attorneys. But the - really my - my first point is that given our unique abilities as lawyers to engage in direct client representation, that is the highest value of what we should express in this rule. The main reason why alternative B is so necessary to me is that our existing rule has been in effect for many, many years, and that rule has failed to inspire more than a very small fraction of Michigan's lawyers to undertake this important work. And that, in turn, means that we've left thousands of fellow citizens without any real hope of securing adequate representation in the legal issues - the civil legal issues that they are facing.

CHIEF JUSTICE YOUNG: I want to challenge what you've just said. The rules have failed to inspire, in affect, professionalism which requires an obligation to provide pro bono services to those need it. Is that what you think the obligation of the rules are - to inspire - or to provide an understanding of what the minimal professional obligations are.

MR. NUSSBAUMER: I think it's both, your honor. I think -

CHIEF JUSTICE YOUNG: I thought that was your role as an educator of lawyers.

MR. NUSSBAUMER: And I take that role gladly, your honor, and that's why we've developed the - the two clinics and the seven pro bono programs of which I - I mentioned. But we can't do it alone. I think part of - part of the problem here is that you know when a - when we take our oath that says we will never reject the cause of the defenseless or oppressed for any considerations personal to ourselves. I'm not sure when I took that oath I knew exactly what it meant. I know now based on the work that I've done. But it would help us greatly in that educational mission if the Court was clear to both students and lawyers that the first and highest priority is providing that direct representation to persons of limited means. Secondly, I'd like to make the point that I tried to make in my letter which is that I think that the core of this proposal which is to provide direct representation to persons of limited means is facially neutral and apolitical--it's neither liberal nor conservative.

JUSTICE MARKMAN: Well, why did you invoke in support of alternative B the work that you've done, very admirable work in support of military personnel and soldiers, I don't understand exactly what that entailed, but why did you invoke that in support of your - your perspectives that we would be more inspirational in our rules if we were to focus upon indigent persons where military and - personnel and soldiers are not necessarily indigent at all.

MR. NUSSBAUMER: Well, your honor, I guess I disagree with that premise, and let me share my experience in that. The military personnel who we deal with in our programs are enlisted men and women who are of very limited means - many times. And for a fact they cannot - cannot even afford a basic will and power of attorney before they deploy for combat duty overseas. So I use that example because, in fact, when we work with those folks typically we go to someplace like Camp Grayling and there's a team of six or eight lawyers, and most of the folks we deal with are privates, corporals, and low ranking sergeants, many of whom don't have the funds to get those basic documents in order before they deploy overseas. And I -

CHIEF JUSTICE YOUNG: And you should conclude now.

MR. NUSSBAUMER: Your honor, the third point that I'd like to make is that - and this gets back, judge, to your question about the educational requirements - or the educational obligation that we have as law schools.

CHIEF JUSTICE YOUNG: To professionals not just the educational environment. It is the Bar itself that has the professional responsibility to ensure that its members adhere to the professional standards.

MR. NUSSBAUMER: I agree -

CHIEF JUSTICE YOUNG: It is no one individual or one person, it is all of our responsibility.

MR. NUSSBAUMER: I agree 100%, your honor. And I think if this Court clarified what those obligations are it would help all of us, both in the educational part of this and the Bar's part in making -

CHIEF JUSTICE YOUNG: What's missing from the current rule?

MR. NUSSBAUMER: It's general, and it does not prioritize where the greatest need is. The greatest need is the -

JUSTICE MARY BETH KELLY: But if the oath has already imposed that obligation - as you recited, one of the great lines of our oath, and our oath is more specific than other states, so our oath is very specific. Lawyers are moved by it, they keep it, they know it, they can recite it like you do, and the oath specifically says you must do this. And, as you said, we - we as a judiciary can't live without the clinics, we can't live without pro bono service, we can't live without lawyers being inspired to do the pro bono work that they personally are inspired to do. So why should we adopt a rule that says this is what you should be inspired to do? You should be inspired in this particular way.

MR. NUSSBAUMER: Because I think this Court is the leader. The Court has a leadership role in this context that I think it can exercise and set the tone, not only for the law students, but the lawyers and the Bar, to help us in - as - as Tom mentioned, in convincing lawyers at different firms and in different offices that their obligation is to abide by that oath and render those services to - focused on the folks who need it most.

JUSTICE MARKMAN: Do I fairly characterize what you're saying when I suggest that you wish not merely to inspire pro bono, but you wish, by the adoption of alternative B, to inspire a more specific kind of pro bono.

MR. NUSSBAUMER: I do - that is my point, exactly, your honor. I think - I think the range of charitable and community service work that is out there presents a confusing situation to lawyers.

JUSTICE MARKMAN: So - so that might be better understood as the defining line among these alternatives, not the inspiring or the inspiriting of pro bono work, but whether or not we're gonna point that effort in a particular direction.

MR. NUSSBAUMER: I believe alternative B is asking you to point the Bar and lead the way in the direction of

providing direct representation to persons of limited means.

JUSTICE MARKMAN: Thank you.

MR. NUSSBAUMER: I agree with that. Your honor, thank you, very much for being here. It's a pleasure - it's a pleasure to be here. I thought on the elevator this morning it was 1983 the last time I appeared in this Court and -

CHIEF JUSTICE YOUNG: It wouldn't be this courtroom, but -

MR. NUSSBAUMER: Yeah, I know, and it wasn't. And when I checked in with Corbin Davis this morning he said yes, and everybody we used to know is dead. So it's a pleasure to be here and I thank you, very much for your time.

JUSTICE MARKMAN: By the way, sir, have we resolved the issue that you were here before on the last time.

MR. NUSSBAUMER: You have your honor.

MR. DUBIN: May it please the Court. Good morning Justices. My name is Larry Dubin, I'm a professor at the University of Detroit-Mercy School of Law. It is an honor to be here today to support alternative B of the proposed rule to 6.1 of the Michigan Rules of Professional Conduct. I support the letter that was submitted by the Dean of my law school, Lloyd Semple, and the content of the letters also in support of this proposal. I think it's worth noting the history of Rule 6.1 so that at least the thoughts that I have reflect many, many years of discussion and debate about Rule 6.1, and the ABA's version of it which I think proposal B essentially adopts. Prior to the ABA's original adoption of 6.1 back in the 1980s, the early 1980s, the requirement was first viewed in the original draft to be a mandatory obligation. Didn't set any specific hours that had to be performed by lawyers, but it was to be mandatory with a reporting requirement. That was shot down by the American Bar Association. They then decided to make it a voluntary rule, but in the process of doing so they recognized one of the ethical considerations, which I realize the Michigan Supreme Court did not adopt, but in the ABA Model Code of Professional Responsibility it

said "historically the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donate their services on behalf of such individuals." So I think the - the primary hope - the primary intention of going from a mandatory rule to a voluntary rule was to not only make it aspirational, but also to recognize that the top priority, although pro bono, in general, means for the betterment of society - that's a fairly broad way of looking at the rule, but the primary motivation - and I think the tradition in the legal profession - was to make legal services available to those who cannot basically afford it. And the reason for that is that there certainly cannot be justice when one party involved in a legal dispute is not represented. So that was the priority. In 1993, the American Bar Association again undertook a study of the rule - and the original rule was essentially the now Michigan rule - and they decided at that time that they could improve it by having a rule which specified a certain number of hours, a certain amount of money that a lawyer could pay to a legal aid society if the lawyer was not performing those services. Again, in 2000 - the ABA 2000 Ethics Commission undertook a study of the rule to improve it again - much more debate. And they even reconsidered making it a mandatory rule at that time. Again, ultimately decided not to, but, again, in the hope of promoting the purpose - the tradition - of helping people who cannot afford services they changed 6.1 to read in its very first sentence "every lawyer has a professional responsibility to provide legal services to those unable to pay." That was the primary statement of that change. And it was done because they felt that in the absence of this change lawyers weren't providing the necessary pro bono services that they felt were necessary to meet the unmet legal needs. So alternative B adopts the position taken in the current ABA Model Rule with a slight decrease in the amount of money to be paid if you're not gonna do pro bono work and the number of hours that lawyers should provide for pro bono services. In my opinion, it's a worthy rule. It would improve, certainly from the standpoint of - we've heard some discussion as far as lawyers practicing law - to inspire law students. I think it is a good rule to inspire law students who will become lawyers as well as inspiring lawyers. It - generally, Justice Young, I do think that the ethics rule set minimum standards. This is a rule that doesn't really set a minimum standard subject to discipline, it sets the goal to be an appropriate professional as a member of the legal profession. And,

therefore, I think it does have an aspirational tone to it. I think that the - the rule provides a structure, a priority of the way in which pro bono benefits can be provided -

CHIEF JUSTICE YOUNG: Please make your remarks concluding now - conclude your remarks, please.

MR. DUBIN: Thank you. Thank you, very much.

JUSTICE MARKMAN: But as with your predecessor, the preceding witness, the issue is not so much - the issue really focuses, again, on the direction in which pro bono ought to go because you acknowledge that there're no higher minimum standards, to use your term, in alternative B than there are in alternative A, is that fair to say?

MR. DUBIN: Well, alternative A does not set standards.

JUSTICE MARKMAN: But neither does B.

MR. DUBIN: Well, B sets standards that lawyers should - should meet. It gives a lawyer who is contemplating pro bono work some idea of what might be an appropriate way, an appropriate level of satisfying the requirements set by the Michigan Supreme Court to be deemed an appropriate professional - living up to the professional standards that lawyers should adhere to.

CHIEF JUSTICE YOUNG: I'm under the impression that the State Bar of Michigan has done that independently, isn't that correct, that they have largely suggested to their membership the levels of contribution, etc.

MR. DUBIN: Yes, Justice Young, that is correct. And I think that if we're looking for consistency, I think that the appropriate voice if those levels are deemed to be reasonable would be from the Michigan Supreme Court. I think it is the embodiment of the ethics rules and the aspirational goals to be a professional that lawyers look to and study from the Michigan Rules of Professional Conduct.

CHIEF JUSTICE YOUNG: Thank you.

MR. DUBIN: Thank you.

MR. GILLETT: Good morning Justices. My name is Robert Gillett and I'm co-chair of the Pro Bono Initiative at the State Bar of Michigan, and I'm also the Director of Legal Services of South Central Michigan which is a regional legal aid program. And so I've been involved in the direct administration of pro bono programs for many years.

CHIEF JUSTICE YOUNG: Is it accurate that the Bar has published essentially the kinds of standards that are reflected in proposal B?

MR. GILLETT: Yes. And I wanted to start out trying a different answer to Justice Markman's question. And that is, really we're not trying to change the direction or point the direction of pro bono. One of the benefits of this is that it takes the Bar standards that's existed since 1993 cases - 30 hours, $300 - and takes - puts those standards in the rule. And to the extent that you know from my perspective as chair of the PBI, there are many conversations about what is pro bono, is this pro bono, what is expected of me, what can I do, I don't know what I should be doing. Having the standards in the State Bar's voluntary standard incorporated into the rule is - would be of tremendous benefit to the - to the Bar. It answers - you know the voluntary standard is not something that every lawyer carries around with them, unlike the Bar ethics rule which every lawyer is familiar with, it's right there in the court rules, a copy that we all carry to court with us everyday. And so one of our goals - our primary goal was to take the current voluntary standard which provides guidance and direction to all lawyers in the state and to incorporate it into the Rule 6.1. The - I want to comment on the broad support that's reflected by the letters that we received - you know large firms, small firms, trial lawyers, defense lawyers - that the profession as a whole supports the direction the pro bono programs are going, and would appreciate the guidance that's contained in the rule. The basic approach that we've taken at the State Bar to pro bono is what we call the "big tent approach." And that is that we try to find or if necessary to help create a program that - every lawyer can participate in pro bono - whether it's doing intake in a phone bank, whether it's doing advice in a church, we want to find something that's litigation or nonlitigation that every lawyer can participate in, and we thought that the broad list of

examples in the rule helped express the broad sense of pro bono that we're trying to support in the state.

JUSTICE MARKMAN: Mr. Gillett?

MR. GILLETT: Yes.

JUSTICE MARKMAN: I very much appreciate the leadership you've supplied in this effort at the State Bar. What if we took the first paragraph of alternative B beginning with "every lawyer has a professional responsibility" and we ended it up with the (inaudible) of higher contribution, and you just appended that to alternative A, would that satisfy you?

MR. GILLETT: Um.

JUSTICE MARKMAN: That communicates what I understand to be the aspirational concerns you've just defined. Is there anything that would be lacking at that juncture?

MR. GILLETT: I would prefer proposal B as it's submitted I acknowledge that what you have suggested goes 90% of what we were trying to do with this in terms of providing guidance.

CHIEF JUSTICE YOUNG: Just by adding the first sentence to the existing language.

JUSTICE MARKMAN: Actually, the first three sentences.

MR. GILLETT: The first paragraph - the whole first paragraph before you start the list A, B, C, and the comments. Again, I don't want to edit the rule here in conversation, but we really had two goals. One was to provide the guidance and the voluntary standard to all lawyers, and then the second was the ABA consistency that Mr. Linn spoke to because we do have significant pro bono contributors that are - that are part of the ABA system, they're multi-state firms. And, again, guidance and consistency were really the two benchmarks that we were working from. And so the more of the ABA rule that could be incorporated the better, but in terms of kind of an apolitical these are your expectations, what you've suggested goes along way towards meeting those. I wanted to briefly comment -

CHIEF JUSTICE YOUNG: Conclude your remarks.

MR. GILLETT: Pardon me?

CHIEF JUSTICE YOUNG: You should conclude your remarks.

MR. GILLETT: Okay. I wanted to comment on the appropriateness of the goal of the priority for the poor, and just to say that we all recognize that a lawyer's personal interest, their passion, is the greatest motivator to become involved in pro bono and we respect that. And we want to recognize and celebrate that, but at the same time we recognize the thousands of low income, unrepresented people in our courts, and we believe that the court system as a whole benefits tremendously by having pro bono assistance. Without pro bono assistance we'll never be able to address the pro se problem, and so we think the prioritization on services, not exclusive, but a prioritization on services to the poor is appropriate. Thank you, very much.

CHIEF JUSTICE YOUNG: Thank you, very much. I believe this concludes the public hearing portion. Thank you.